

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROBERT G. RUSSELL, AK4805,

Petitioner,

v.

ROBERT W. FOX, Warden,

Respondent.

Case No. [18-cv-01112-CRB](#) (PR)

**ORDER DISMISSING PETITION  
FOR A WRIT OF HABEAS  
CORPUS**

(ECF No. 4)

Petitioner, a state prisoner currently incarcerated at the California Medical Facility in Vacaville, has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 seeking release from state prison pursuant to Proposition 57. He also seeks leave to proceed in forma pauperis (IFP) under 28 U.S.C. § 1915.

**BACKGROUND**

Petitioner was convicted by a jury in Santa Cruz County Superior Court of various offenses arising from a traffic accident in which, while driving drunk, he struck a pedestrian who was walking on the road with his wife. Following a bench trial, the court found that petitioner had six prior strike convictions and six prior serious felony convictions and, on December 2, 2011, sentenced him to 50 years to life in state prison pursuant to California's Three Strikes Law.

Petitioner unsuccessfully appealed, and sought collateral relief from, his conviction and sentence in the California courts. He also unsuccessfully sought a federal writ of habeas corpus from this court invalidating his state conviction and sentence.

**DISCUSSION**

A. Standard of Review

This court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

1 violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). It  
2 shall “award the writ or issue an order directing the respondent to show cause why the writ should  
3 not be granted, unless it appears from the application that the applicant or person detained is not  
4 entitled thereto.” Id. § 2243. The petition may be dismissed if it plainly appears from the face of  
5 the petition and any exhibits attached to it that the petitioner is not entitled to relief. Hendricks v.  
6 Vasquez, 908 F.2d 490, 491 (9th Cir. 1990).

7 B. Claims & Analysis

8 Petitioner does not challenge his state conviction or sentence, but rather the denial of a  
9 “prisoner release order under Prop[osition] 57.” ECF No. 1 at 1. He claims that “non-violent  
10 third strikers” like himself are eligible for parole consideration and release under Proposition 57,  
11 but that the California Department of Corrections and Rehabilitation (CDCR) continues to exclude  
12 them. Id. He seeks a “prisoner release order” on that basis from this court. ECF No. 5 at 5.

13 California’s Proposition 57, approved by voters in November 2016, makes parole more  
14 available for certain felons convicted of nonviolent crimes. Specifically, Proposition 57 added  
15 Article I, section 32 to the California Constitution. That section provides, in relevant part, “Parole  
16 consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison  
17 shall be eligible for parole consideration after completing the full term of his or her primary  
18 offense,” defined for these purposes as “the longest term of imprisonment imposed by the court  
19 for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative  
20 sentence.” Cal. Const., art. I, § 32(a)(1).

21 Proposition 57 only provides a prisoner who has completed his base term with a parole  
22 consideration hearing before the California Board of Parole Hearings (BPH). California state  
23 court cases addressing application of Proposition 57 “uniformly state that Proposition 57 creates a  
24 mechanism for parole consideration, not a vehicle for resentencing, and does not entitle [a  
25 prisoner] to seek relief in court in the first instance.” Daniels v. Cal. Dep’t of Corr. and Rehab.,  
26 No. 1-17-cv-01510-AWI-BAM, 2018 WL 489155, at \*3 (E.D. Cal. Jan. 19, 2018); see also  
27 Travers v. California, No. 3:17-cv-06126-SI, 2018 WL 707546, at \*2 (N.D. Cal. Feb. 5, 2018)  
28 (citing California state court cases). After all, the plain language of Article I, section 32 provides  
that a person is eligible for “parole consideration.” Cal. Const., art. I, § 32(a)(1).

1 To the extent petitioner seeks federal habeas relief based on a claim that he has been  
2 improperly denied a prisoner release order based on Proposition 57, the claim must be dismissed  
3 because the addition of § 32 to Article I of the California Constitution only resulted in him  
4 potentially becoming “eligible for parole consideration” and in no way undermines the validity of  
5 the 50 years-to-life sentence he is serving. And to the extent petitioner claims CDCR is  
6 improperly excluding him from parole consideration under Proposition 57, the claim must be  
7 brought in a civil rights action under 42 U.S.C. § 1983, if it may be brought in federal court at all.

8 Under the law of the circuit, a prisoner’s claim which, if successful, will not necessarily  
9 lead to immediate or speedier release from custody falls outside the “core of habeas corpus” and  
10 must be pursued (if at all) in a civil rights action under § 1983, rather than in a habeas action.  
11 Nettles v. Grounds, 830 F.3d 922, 931, 934-35 (9th Cir. 2016) (en banc). Here, success on a claim  
12 that CDCR is improperly excluding petitioner from parole consideration under Proposition 57  
13 would result in petitioner receiving a parole consideration hearing before BPH, but not necessarily  
14 in his immediate or speedier release from custody. Petitioner still must be found suitable for  
15 parole before he may be released from state prison. Cf. id. at 934-35 (habeas not proper remedy to  
16 challenge disciplinary finding where reversal of finding would not necessarily lead to grant of  
17 parole (and consequently speedier release), because many factors are considered in decision  
18 whether to grant parole and parole could still be denied if disciplinary finding was reversed ).  
19 Under Nettles, petitioner’s only potential recourse in federal court on a claim of improper  
20 exclusion from parole consideration under Proposition 57 is to file a § 1983 action because the  
21 claim falls outside the core of habeas corpus. Accord Travers, 2018 WL 7070546, at \*8  
22 (concluding that claim to enforce rights under Proposition 57 must be brought in civil rights action  
23 under § 1983, if it may be brought in federal court at all).<sup>1</sup>

## 24 CONCLUSION

25 For the foregoing reasons, the petition for a writ of habeas corpus is DISMISSED without  
26 prejudice to pursuing a civil rights action under § 1983. And pursuant to Rule 11 of the Rules

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27 <sup>1</sup>A district court may construe a habeas petition as a civil rights complaint under § 1983 if the  
28 petition is amenable to conversion on its face, meaning that it names the correct defendants and  
seeks the correct relief, and the court notifies and obtains informed consent from the prisoner. See  
Nettles, 830 F.3d at 935-36. This is not such a case.

1 Governing Section 2254 Cases, a certificate of appealability (COA) under 28 U.S.C. § 2253(c) is  
2 DENIED because it cannot be said that “reasonable jurists would find the district court’s  
3 assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473,  
4 484 (2000).

5 But based solely on petitioner’s affidavit of poverty, his motion for leave to proceed IFP  
6 (ECF No. 4) is GRANTED.

7 **IT IS SO ORDERED.**

8 Dated: April 2, 2018

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10 CHARLES R. BREYER  
11 United States District Judge  
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UNITED STATES DISTRICT COURT  
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ROBERT G. RUSSELL,  
Plaintiff,

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Defendant.

Case No. 3:18-cv-01112-CRB

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 2, 2018, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Robert G. Russell ID: AK4805  
San Quentin State Prison West Block 421  
San Quentin, CA 94976

Dated: April 2, 2018

Susan Y. Soong  
Clerk, United States District Court

By:   
Lashanda Scott, Deputy Clerk to the  
Honorable CHARLES R. BREYER